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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ZAL MOBED, Defendant and Appellant.	G055510 (Super. Ct. No. 14WF4264) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

After stabbing his estranged wife multiple times, defendant was convicted of attempted, deliberate and premeditated murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a)).[1] The jury found that in the commission of the offense, defendant personally inflicted great bodily injury upon his wife under circumstances involving domestic violence (§ 12022.7, subd. (e)), and he personally used a deadly weapon (§ 12022, subd. (b)(1)). The court imposed an indeterminate term of seven years to life for the attempted, premeditated murder and added five years for the great bodily injury enhancement and one year for the weapon enhancement.

The evidence at trial showed defendant brought a knife with him when he went to his wife's apartment to demand she not date other men. When she did not agree to his demand, he stabbed her several times in the living room. After his knife broke, defendant pulled her into the kitchen, where he obtained a larger knife and stabbed her several more times, before turning the knife on himself. Both defendant and his wife appeared seriously injured when the police arrived.

Defendant was interviewed by the Huntington Beach Police Department three times, each time by a different officer: Sergeant Dove asked defendant a few questions at the scene to determine what happened; Officer Smith questioned defendant in the ambulance on the way to the hospital; and Detectives Wickser and Tunstall interviewed defendant at the hospital the next day. In each interview, defendant admitted stabbing his wife before stabbing himself. Before questioning defendant at the scene and in the ambulance, the police did not inform defendant of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Defendant, however, was advised of and waived his *Miranda* rights before talking to the detectives at the hospital. The court admitted defendant's post-*Miranda* statements at the hospital, finding the police had not

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[1] All further statutory references are to the Penal Code unless otherwise stated.

deliberately used a two-step interrogation technique and that defendant's statements were voluntary.

Defendant presents two issues on appeal. First, defendant contends the police improperly withheld *Miranda* warnings until after they had questioned him in a coercive manner and obtained incriminating statements at the scene and in the ambulance. (*Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*).) We hold the court properly admitted defendant's post-*Miranda* statements. Second, defendant contends the failure of his attorney to request CALCRIM No. 522, an instruction pertaining to the relationship between provocation and premeditation, constituted ineffective assistance of counsel in violation of his Sixth Amendment rights. Defendant has failed to show either deficient performance or prejudice from his counsel's failure to request the instruction and we affirm the judgment.[2]

FACTS

Defendant and F.Z. were married in Iran in 1996. They eventually moved to the United States and had two children. After several years, they started having marital problems, and by November 2014, they were living in separate residences and had filed for divorce.

The day before Thanksgiving in 2014, defendant called F.Z. and asked to take the children to his sister's home on Thanksgiving Day if he did not have to work. He agreed to call her the next morning and let her know his plans.

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[2] In the briefing, both parties agreed the abstract of judgment must be modified to reflect the custody credits awarded defendant at sentencing. This issue has been rendered moot by the trial court's issuance of an amended abstract of judgment correcting the error. On the courts own motion we augment the record to include the amended abstract of judgment filed on June 4, 2018 in the Orange County Superior Court case No. 14WF4264.

Around 9:30 a.m. on Thanksgiving Day, defendant knocked on F.Z.'s door. He did not call her before coming over as they had agreed. When she asked what he was doing there, he said he wanted to talk to her and asked her to open the door. She opened the door a crack. Defendant removed his shoes, pushed open the door, and came inside. He took off his jacket and placed it on a chair.

F.Z. sat on the couch and defendant sat in front of her on the floor. Their children were asleep in the bedroom. Defendant said he wanted to celebrate Thanksgiving together as a family with her and their children, but she did not want to spend Thanksgiving with him. Defendant told F.Z. he would provide her financial support, but she had to listen to him and do what he told her and she could not date other men or remarry. F.Z. did not concede to his demands. She responded they could always talk about the children but he could not tell her what to do, and she asked him to leave.

Defendant pulled a paper towel out of his inside jacket pocket and said, "I'm going to show you." He opened the paper towel to reveal a medium size knife. Standing over F.Z., who was still sitting on the couch, defendant stabbed her and said he was going to kill her. After stabbing her five or six times, the handle broke off the knife. F.Z. was bleeding and screaming. Defendant pulled her off the couch and into the kitchen, where he grabbed a second knife from a drawer. He stabbed F.Z. several times while she was lying on the kitchen floor. He again said he was going to kill her.

Defendant ended the attack after both of his daughters came out and screamed at him to stop. F.Z. ran out of the apartment and her daughters followed shortly thereafter. Defendant remained in the apartment and began stabbing himself.

Police and paramedics arrived. F.Z. was transported to the hospital, where she underwent surgery the next day. She suffered lacerations to her face, left breast, both sides of her upper abdomen, left leg, and both hands, all of which required suturing.

Defendant came out of the apartment after the police arrived. He had injuries to his stomach and left wrist. The following day, police detectives interviewed defendant in his hospital room. The interview was recorded, and the recording was played for the jury. In the interview, defendant explained he went over to F.Z.'s apartment and asked her to spend Thanksgiving with him and their children rather than her going to a party. He brought a fruit knife with him from his house because she laughed at him when he previously tried to talk to her. He told her that he works and pays for everything so she had to listen to him. When she said that he "cannot do anything" and laughed at him, he pulled out the knife and told her that he was serious. F.Z. tried to stand up, but defendant pushed her back down on the couch and stabbed her. He did not remember how many times. He told the detectives the knife broke when F.Z. grabbed it and he took her to the kitchen because she was bleeding on the carpet. She was screaming for their daughter to call the police. Defendant put his hand over her mouth to get her to stop screaming, but she bit his hand. Defendant told the detectives he grabbed a knife from the kitchen counter and stabbed F.Z. in the hand and then stabbed himself in the stomach.

When Detective Wickser asked defendant why he brought the knife with him, defendant said he wanted to stab her to show her that he was serious but he denied wanting to kill her. He told the detectives he showed F.Z. the knife and said to her "remember I told you if you lie I'm going to kill myself and yourself," and told her "I'm not going to kill you but I am serious. You do the right thing." Defendant repeatedly denied wanting to kill F.Z.; at one point, he said he wanted to kill himself, but he did not want to kill her.

The prosecution also presented evidence that defendant had previously threatened to kill F.Z. In March 2013, defendant became upset when F.Z. did not want to go to his sister's house. He went to the kitchen, got a knife, put it to her neck, and said he

wanted to kill her. After moving out in May 2014, defendant pushed F.Z. and threatened to kill her but not at that moment because their children were still young.

Defendant testified at trial, describing problems in his marriage. He felt mistreated because F.Z. wanted a divorce. Defendant admitted stabbing F.Z. on Thanksgiving morning and his testimony concerning the incident was mostly consistent with her testimony. He additionally explained that before going to F.Z.'s apartment, he took a fruit knife from his kitchen, wrapped it in a paper towel, and placed it inside his jacket. He brought the knife with him to scare F.Z. because she would laugh at him and did not take him seriously when he talked to her. He wanted to talk her into spending Thanksgiving Day with him and the children rather than her going to a party. He also wanted to tell her he was agreeable to separating and paying child support, but he did not want her to date someone else. He loved her and did not intend to stab or kill her.

In his testimony, defendant explained that after F.Z. told him to leave, he grabbed his jacket from the chair and told her she should not date because they have young children. F.Z. responded she would date anyone she wanted. When F.Z. stood up and tried to push him out of the house, defendant became angry and lost control. He pulled out the knife and stabbed her. He admitted taking F.Z. to the kitchen and stabbing her with a second knife after his knife broke. He denied threatening to kill her or himself that day, and he denied wanting to kill her.

DISCUSSION

Defendant's Statements at the Hospital Were Admissible

Defendant contends the police officers deliberately withheld *Miranda* warnings until after he made incriminating statements and their failure to advise him of his rights at the outset undermined the subsequent advisement and waiver at the hospital. He contends the admission of his post-*Miranda* statements at the hospital violated his

federal constitutional rights to remain silent, to counsel, and to due process. We disagree. Below, we begin by explaining the relevant legal principles concerning midstream *Miranda* warnings and the voluntariness of confessions. We then summarize the evidence presented at the Evidence Code section 402 hearing and the trial court's findings. We analyze the evidence and conclude substantial evidence supports the court's findings that the police did not deliberately employ a two-step interview process designed to undermine defendant's *Miranda* rights and that defendant's statements were voluntary. We independently conclude the trial court properly admitted defendant's post-*Miranda* statements into evidence.

1. *Principles Pertaining to Midstream* Miranda *Warnings*

"As a prophylactic safeguard to protect a suspect's Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that 'he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" (*People v. Martinez* (2010) 47 Cal.4th 911, 947.) "Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*." (*Oregon v. Elstad* (1985) 470 U.S. 298, 307 (*Elstad*).)

In *People v. Camino* (2010) 188 Cal.App.4th 1359 (*Camino*), we summarized the law applicable to midstream *Miranda* cases, where a defendant is interviewed before and after the giving of *Miranda* warnings, derived from the United States Supreme Court's decisions in *Elstad, supra,* 470 U.S. 298 and *Seibert, supra,* 542 U.S. 600. "[A] defendant's postwarning inculpatory statements are generally admissible

if the prewarning statements *and* the postwarning statements were voluntarily made. [Citation.] But where law enforcement uses a two-step interrogation technique 'in a calculated way to undermine the *Miranda* warning,' curative measures must be taken to ensure that a reasonable person would understand the *Miranda* advisement and the significance of waiving *Miranda* rights." (*Camino,* at pp. 1363-1364; see also *U.S. v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1150 ["a trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream *Miranda* warning was objectively ineffective"].)

"'In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda* . . . , the scope of our review is well established. "We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine . . . whether the challenged statement was illegally obtained."'" (*Camino, supra,* 188 Cal.App.4th at pp. 1370.)

2. *General Principles Applicable to Determining Whether a Confession is Voluntary*

"A statement is involuntary if it is not the product of '"a rational intellect and free will."'" (*People v. Maury* (2003) 30 Cal.4th 342, 404.) "To determine the voluntariness of a confession, courts examine '"whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession.' [Citation.] In making this determination, courts apply a 'totality of the circumstances' test, looking at the nature of the interrogation and the circumstances relating to the particular defendant. [Citations.] With respect to the interrogation, among the factors to be considered are '"'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity'. . . ."' [Citation.] With respect to the defendant, the relevant factors are '"'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."'" [Citation.] 'A statement is

involuntary [citation] when, among other circumstances, it "was '"extracted by any sort of threats . . . , [or] obtained by any direct or implied promises . . . ."'"'" (*People v. Dykes* (2009) 46 Cal.4th 731, 752.)

In reviewing a trial court's determination of voluntariness, we accept a trial court's factual findings, provided they are supported by substantial evidence, but independently review the ultimate legal question of whether a confession was voluntary. (*People v. Dykes, supra*, 46 Cal.4th at pp. 752-753.)

3. *Factual Background*

Both parties filed in limine motions pertaining to defendant's statements to the police. Defendant sought to exclude all of his statements on the grounds they were involuntary and obtained in violation of *Miranda* and *Seibert*, and the People moved to admit defendant's post-*Miranda* statements. The court held an Evidence Code section 402 hearing on the issue, at which the prosecution presented the testimony of the three officers who questioned defendant and the court was provided a recording and transcript for each of the three interviews.

A. *Defendant's Statements to Sergeant Dove at the Scene*

When Sergeant Dove arrived at the scene, he saw a female stabbing victim being led out to paramedics. He was told the suspect was still inside the apartment, which was on the second floor of a two-story apartment building. Defendant walked out of the apartment with his hands raised and was asked to lift his shirt and turn around so the officers could check for weapons. When defendant raised his shirt, Sergeant Dove saw defendant was bleeding profusely through abdominal stab wounds and was "covered in blood."

Defendant was handcuffed and seated on a bench inside the apartment complex. Not only was defendant bleeding profusely, he was also pale, sweating, and

having a hard time breathing. Sergeant Dove noticed every time defendant spoke or tried to breathe "the wound to his abdomen was bubbling and blood was coming out."

As the apartment had not been checked for additional suspects or victims, Sergeant Dove questioned defendant to determine who had inflicted his injuries. He was concerned defendant's wounds might be fatal and told him so, explaining he was not sure if defendant was a suspect or not and he wanted to get more information. He did not advise defendant of his *Miranda* rights prior to questioning him. Sergeant Dove believed he first asked defendant if someone else was in the apartment, but that question was not recorded. The recording begins with the sergeant commenting about a "dying declaration" and asking defendant if he stabbed himself, to which defendant said, "Yes." Sergeant Dove questioned defendant as to whether he stabbed his wife with the same knife he used to stab himself. Defendant stated he stabbed himself with a "big knife" and stabbed his wife with a different knife. Upon learning the knife was in the apartment, one of the officers requested defendant's permission to retrieve it. At the end of the recording, Sergeant Dove commented defendant's wound "looks deep" and someone needs to ride in the ambulance with defendant and "try to get a dying declaration from him."

Sergeant Dove's interview of defendant was brief, lasting 30 seconds to a minute. His questioning of defendant was not designed to soften up defendant for a future interview. Based on his observation of defendant's injuries, Sergeant Dove believed there was a "good chance" defendant might die before he arrived at the hospital. He questioned defendant because he believed it might be the last opportunity anyone would have to question him. It was not a ruse when he told defendant his injuries appeared fatal.

B. *Defendant's Statements to Officer Smith in the Ambulance*

At Sergeant Dove's request, Officer Smith rode with defendant in the ambulance to the hospital. As defendant was being loaded into the ambulance, Officer Smith asked the paramedics if defendant's injuries were life threatening and they said there was a chance he would die. Defendant was bleeding from several wounds, and tissue or possibly organs were oozing out of some of his wounds. He was pale and his voice was weak.

Without advising defendant of his *Miranda* rights, Officer Smith interviewed defendant in the ambulance for 10 to 15 minutes on the way to the hospital. A paramedic was also in the back of the ambulance treating defendant, who was restrained.

Officer Smith asked defendant if his wounds were self-inflicted and whether he was trying to kill himself. He told defendant he might die from his injuries and asked if defendant wanted to give a "dying declaration" that provided an account of what happened. Officer Smith asked defendant if he stabbed his wife, and defendant replied, "Yes." Defendant stated he stabbed himself after he stabbed his wife. Defendant explained he and his wife were separated and living apart. He had told her he would live separately and financially support her and their children but he did not want her in a relationship with someone else, and she had refused to agree to this. In response to questioning, defendant stated he brought the knife with him to F.Z.'s apartment "to trick her" to show her he was serious.

While the paramedic was treating defendant and asking him health questions, Officer Smith halted his questioning of defendant. But thereafter, he resumed questioning defendant about the knife. Defendant stated he had the knife in his coat and did not show it to his wife when he first got to the apartment. He showed it to her after they talked and she told him he could not tell her what to do and to get out of her home.

After his wife told him this, he showed her the knife and said, "'I am serious. Don't push me. Don't tell me I cannot do.'" She laughed at him and told him to get out.

Officer Smith asked defendant how many times he stabbed his wife. Defendant did not remember, but indicated maybe two or three times. He stabbed her once in the living room but his knife broke. He took her into the kitchen, where he tried to stab her two times, but she was trying to defend herself. When asked if he wanted her to die, defendant responded, "I don't know."

While interviewing defendant, Officer Smith received a phone call from Detective Wickser. Officer Smith explained to Wickser they were going to the hospital and defendant was giving him "a dying declaration about what happened." Wickser reminded Smith to record his conversation with defendant.

Officer Smith testified the Huntington Beach Police Department does not have a two-step interrogation policy to do an unconstitutional interview followed by another interview and he was not trying to "soften [defendant] up" for a future interview. He interviewed defendant in the ambulance because of defendant's "grave condition" in order to get a statement about what happened in case defendant should not survive his injuries.

C. *Defendant's Statements to the Detectives at the Hospital*

Defendant had surgery the same day he was taken to the hospital. The following afternoon, Detective Wickser, with his partner Detective Tunstall, interviewed defendant in a patient room at the hospital; defendant was handcuffed to the hospital bed. The interview lasted almost two hours, during which time a nurse came in and out of the room to treat defendant.

Prior to beginning the interview, Detective Wickser did not make any promises to defendant or his family, offer him any leniency or favors, or verbally or physically threaten him. Neither Wickser nor his partner were in uniform and their guns

remained holstered during the interview. The detectives were aware defendant was recovering from surgery but did not inquire whether he had received any pain medication. Defendant was lucid and his answers were responsive to their questions. Defendant, who has been living in the United States since 2003, was able to communicate with them in English.

Detective Wickser had not previously spoken to defendant. He was aware defendant had been questioned by Sergeant Dove at the scene without being informed of his *Miranda* rights and that defendant had stated he stabbed his wife and then himself. Detective Wickser was also aware Officer Smith interviewed defendant in the ambulance, but prior to questioning defendant at the hospital, the detective was unaware of defendant's statements to Officer Smith.

Before questioning defendant, Detective Wickser read defendant his rights, stating: "If you don't understand these just let me know. Okay? You have the right to remain silent. Do you understand that?" Defendant: "Repeat that." Detective Wickser: "You have the right to remain silent." Defendant: "Remain silent? No. I'm not silent." Detective Wickser: "No. You have that right though. You have that right to remain silent, if you wish." Defendant: "Okay." Detective Wickser: "Okay? Anything you say—" Defendant: "I can (INAUDIBLE); yeah?" Detective Wickser: "Yeah. Anything you say can and will be used against you in a court of law. Do you understand that?" Defendant: "Yeah." Detective Wickser: "Okay. You have the right to talk to a lawyer and have him present with you while you are being questioned. Do you understand that?" Defendant: "Yeah." Detective Wickser: "Okay. If you can't afford to hire a lawyer one will be appointed to represent you before any questioning, if you wish. Okay?" Defendant: "Yeah." Detective Wickser: "You can decide at any time to exercise these rights and not answer any questions or make any statements. Okay?" Defendant: "Yes." Detective Wickser then asked defendant for his side of the story.

Defendant told the detectives about his marriage and the problems he had with his wife. In response to questioning, defendant admitted taking a small, fruit knife with him to talk to F.Z. and stabbing her in the living room after she laughed at him. He told the detectives his knife broke when F.Z. grabbed it. He then took her to the kitchen and stabbed her with a knife that was on the counter, before stabbing himself. Defendant denied wanting to kill F.Z. and explained he took the knife to show her he was serious. She had repeatedly "disobey[ed]" him and laughed at him. He just wanted her to do one thing—not date other men.

During the interview, the detectives gave defendant a break when a nurse came in to administer antibiotics. A few times during the interview, the detectives asked defendant if he wanted water, ice chips, or anything else.

D. *Trial Court's Ruling*

The court ruled defendant's statements during the hospital interview were admissible under the totality of the circumstances. The court found defendant's statements were voluntary and that *Seibert, supra*, 542 U.S. 600, was distinguishable because, here, the police department did not have a two-step interview policy and defendant's interviews were not a "continuous conversation."

The court found Sergeant Dove and Officer Smith's pre-*Miranda* questions to defendant about whether he wanted to make a dying declaration were not coercive and explained, "[t]he reality was he was very sick. He was potentially dying. And they really were telling him: This is the truth. This is where you're at. [¶] And that gives him an ability, I think, as a grown individual, to make his own choice as to what he wants to say about what just occurred to him." Looking at the totality of the circumstances, the court found there was no evidence the officers were trying to soften up defendant to get a second interview with him.

The court found defendant was informed of his *Miranda* rights at the hospital and voluntarily waived his right to remain silent and agreed to answer questions. The court found defendant was "cognizant," "articulate and intelligent" when he agreed to speak to the detectives. He was able to understand and communicate in English even though it was not his first language and his answers were responsive to the detectives' questions. The court indicated it had listened to the recording of the hospital interview and reviewed the transcript. Based on its review of this evidence, the court found defendant was able to answer questions and respond, had clarity, and did not appear to be under the influence of drugs. The court found defendant's statement was not coerced and defendant's free will was not overcome.

4. *The Police Did Not Deliberately Use a Two-step Interrogation to Circumvent* Miranda

Defendant contends the trial court erred in finding the officers did not engage in a deliberate two-step interrogation to circumvent *Miranda* and his statements at the hospital should have been excluded.

In determining whether law enforcement used a deliberate two-step strategy, "'courts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning.' [Citation.] 'Such objective evidence would include the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements.'" (*Camino, supra*, 188 Cal.App.4th at p. 1370.) We conclude substantial evidence supports the court's factual findings and similarly conclude the officers did not deliberately use a two-step interrogation to circumvent *Miranda*. The subjective and objective evidence in this case indicates the officers did not intentionally

withhold *Miranda* warnings to obtain inculpatory statements in a later *Mirandized* interview.

The record contains evidence of the officers' subjective intent. Officer Smith testified the police department does not have a two-step interrogation policy and both he and Sergeant Dove testified their questioning of defendant was not done with the intent to soften him up for a later interrogation. The court's finding the police department did not have a two-step interrogation policy is supported by substantial evidence.

Likewise, the objective evidence does not indicate the officers deliberately withheld *Miranda* warnings to obtain inculpatory statements in a later *Mirandized* interview. Sergeant Dove's questioning of defendant at the scene was very brief, lasting 30 seconds to a minute. Sergeant Dove asked defendant six questions focused on determining who stabbed defendant and F.Z. and what type of knife was used. The court's finding that when Sergeant Dove questioned defendant he was just trying to determine what was going on and whether a third person was involved is supported by substantial evidence.

Officer Smith elicited additional information from defendant in the ambulance, but this interview was also relatively short lasting 10 to 15 minutes and took place in the presence of the paramedic who was treating defendant. The evidence supported the officer's good faith belief defendant could die, which is a substantial basis for concluding the two-step process was not a ruse.

Detective Wickser's questioning of defendant in the hospital was the only lengthy and complete interview. It occurred more than 24 hours after defendant's unwarned statements to Officer Smith. Although there was some "'overlapping content'" (*Camino, supra,* 188 Cal.App.4th at p. 1378) between defendant's pre-*Miranda* statements to Officer Smith and his post-*Miranda* statements at the hospital, Detective Wickser was unaware of the content of defendant's statements to Officer Smith. Detective Wickser did not confront defendant with his prior statements to Officer Smith

or Sergeant Dove, further evidence the police were not engaging in a two-step interrogation practice.

Defendant attempts to analogize his case to *Camino*, *supra*, 188 Cal.App.4th 1359, a prior midstream *Miranda* decision by this court. In *Camino*, the defendant was interviewed at the police station as a potential witness to the shooting of a fellow gang member, without being advised of his *Miranda* rights. (*Camino*, at p. 1363.) During the interview, defendant revealed incriminating information. The officers gave him a short break, moved him to a different room, advised him of his *Miranda* rights and interviewed him again. On appeal, the defendant challenged the admission of his statements from his second interview. (*Camino*, at p. 1363.) We upheld the trial court's conclusion the interrogating officers did not deliberately use a two-step process to circumvent *Miranda* but remarked it was "a close case because of the continuity between the two interviews and because of the comprehensiveness of the first interview, which left 'little, if anything, of incriminating potential left unsaid' [citation]," and the first interview had "'all the earmarkings of a classic custodial interrogation.'" (*Camino*, at p. 1376.)

Contrary to defendant's assertion, the factors that weighed toward a finding of deliberateness in *Camino* are not present in this case. Here, the pre- and post-*Miranda* interviews took place at three separate locations; not one was at a police station. Each interview was conducted by a different officer. The pre-*Miranda* interviews were not comprehensive. In *Camino*, the pre-*Miranda* and post-*Miranda* interviews were separated by a "short break" (*Camino*, *supra*, 188 Cal.App.4th at p. 1363), but here, more than 24 hours elapsed between the pre-*Miranda* questioning in the ambulance and the post-*Miranda* questioning at the hospital. Here, defendant was potentially dying when the non-*Mirandized* interviews took place. In *Camino*, the defendant was not. We conclude the court correctly found a *Seibert* violation did not occur in this case.

5. *Defendant's Statements Were Voluntary*

Because the police did not deliberately use a two-step interrogation technique to evade *Miranda*, defendant's post-*Mirandized* statements to the detectives were properly admitted if they were voluntary. (*People v. Delgado* (2018) 27 Cal.App.5th 1092, 1097 ["absent a deliberate policy or practice to evade *Miranda*, a subsequent voluntary warned confession is admissible notwithstanding a prior unwarned confession"].)

After listening to the recording of the detectives questioning defendant at the hospital, reviewing the transcript, and receiving testimony at the Evidence Code section 402 hearing, the court found defendant's statements were voluntary and his free will was not overcome. The court found defendant had clarity and did not appear to be under the influence of drugs when he agreed to speak to the detectives at the hospital. The court further found defendant's answers were responsive to the detectives' questions and he was "cognizant," "articulate and intelligent." We conclude the court's findings are supported by substantial evidence and agree defendant's statements were made voluntarily.

Defendant contends his statements were involuntary because his "will was continually overborne by the detectives from the very outset." He compares his case to *Mincey v. Arizona* (1978) 437 U.S. 385 (*Mincey*), wherein the United States Supreme Court held the defendant's hospital confession was involuntary. In *Mincey*, the defendant had been seriously wounded in a shooting. (*Id.* at pp. 387, 396.) A few hours after the shooting, he was interrogated by a detective for almost four hours in the hospital's intensive care unit. Unable to talk because a tube had been inserted in his throat to help him breath, he responded to the detective's questions by writing his answers on paper. (*Id.* at p. 396.) Some of his written responses were incoherent, evidence he was "confused and unable to think clearly." (*Id.* at pp. 398-399.) During the interrogation, the defendant was going in and out of consciousness (*id.* at p. 401), and complained of

"'unbearable'" pain. (*Id.* at p. 398.) The interrogating detective questioned the defendant relentlessly, ignoring his numerous requests for an attorney and to desist the interrogation. (*Id.* at pp. 399-401.) The Supreme Court found "[t]he statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness" (*id.* at p. 401) and commented, "[i]t is hard to imagine a situation less conducive to the exercise of 'a rational intellect and a free will' than [the defendant's]" (*id.* at p. 398).

The circumstances in this case do not compare to those in *Mincey*. At no time did defendant complain of unbearable pain or go in and out of consciousness. Unlike *Mincey*, defendant was willing to talk to the detectives. When informed of his right to remain silent, defendant responded, "Remain silent? No. I'm not silent." Defendant never asked the detectives to cease the interrogation nor asked for an attorney. His answers were coherent and he was able to think clearly. Defendant's statements reflect clarity in his thought process as he described the mistreatment he felt he had suffered from F.Z. in their marriage and he explained the events at F.Z.'s apartment the previous day.

Although the detectives repeatedly suggested defendant intended to kill his wife, defendant's will was not overcome as he maintained he never intended to kill her and only took the knife to show her that he was serious. He was sufficiently clear minded to deny wanting to kill F.Z. His clarity is also reflected in his characterization of the knife he brought as a small, fruit knife. Defendant did not appear to be under the influence of drugs when he spoke to the detectives. His answers were generally responsive and he understood the questions that were asked of him.

The questioning in this case exhibits none of the coercive police activity found in *Mincey*. Several times the detectives offered defendant water or ice chips and asked if he needed anything. At the end of the questioning they thanked defendant for talking to them and asked if they had treated him okay, to which he responded, "Yeah."

Defendant's personal characteristics also support a finding of voluntariness. Defendant was a mature adult with a job, who had purchased two homes. While English was not his first language, the court found he was able to understand and communicate in English. Again, the court's finding is supported by substantial evidence. Defendant's answers were responsive to the detectives' questions, and he asked for clarification or repetition of a question when he did not understand something they said.

Defendant contends Sergeant Dove and Officer Smith's suggestions that he give a "dying declaration" was a ruse to question him about stabbing his wife without giving him *Miranda* warnings. The trial court found the officers' questions to defendant as to whether he wanted to give a "dying declaration" were not coercive as the officers were honestly telling the defendant their assessment of his condition. The court found the officers' comments gave the defendant the ability "to make his own choice as to what he wants to say about what just occurred to him." Substantial evidence supports the trial court's finding. Defendant's will was not overborne. His statements at the scene and in the ambulance were voluntary and there is no coercion that might have "carried over into the [third] confession." (*Elstad, supra*, 470 U.S. at p. 310.) We conclude all of defendant's statements were voluntary and his *Miranda* waiver was knowing, intelligent, and not coerced.

Even if the court erred in admitting defendant's statements at the hospital, any error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Neal* (2003) 31 Cal.4th 63, 86.) Relying on *Lujan v. Garcia* (9th Cir. 2013) 734 F.3d 917, defendant contends his trial testimony cannot be considered in the harmless error analysis. We need not decide whether defendant's trial testimony should be considered in the harmless error analysis. It is clear beyond a reasonable doubt that a rational jury would have reached the same result even if it had not heard the recording of defendant's statements at the hospital or his testimony at trial. F.Z.'s testimony provided undisputed evidence that defendant

arrived Thanksgiving morning with a knife. After she refused his demand that she not date other men and she asked him to leave, defendant pulled out the knife and repeatedly stabbed her while saying he was going to kill her. When his knife broke, defendant dragged F.Z. into the kitchen where he obtained another knife and stabbed her several more times, again telling her that he was going to kill her.

Moreover, defendant's statements in the hospital interview provided some of his strongest defense evidence. Although the detectives repeatedly pressed him about his intentions with the knife, defendant steadfastly maintained he did not intend to kill F.Z. and that he only brought the knife to show her he was serious. It is clear beyond a reasonable doubt that a rational jury would have found defendant guilty of willful, premeditated and deliberate attempted murder in the absence of his statements at the hospital or his testimony at trial.

Defendant Has Failed to Establish His Counsel Rendered Ineffective Assistance

Defendant contends his trial counsel was ineffective for failing to request a pinpoint instruction to inform the jury that it could consider provocation on the issue of premeditation as well as on the reduction of attempted murder to attempted voluntary manslaughter. The jury was instructed on the elements of attempted murder (CALCRIM No. 600), the deliberation and premeditation enhancement (CALCRIM No. 601), and attempted voluntary manslaughter caused by heat of passion (CALCRIM No. 603). Defendant asserts his counsel should have also requested the jury be instructed with CALCRIM No. 522, which provides in relevant part: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or

manslaughter.]" CALCRIM No. 522 is a pinpoint instruction the trial court has no duty to give absent a request. (*People v. Rogers* (2006) 39 Cal.4th 826, 878-880 (*Rogers*) [analyzing CALJIC No. 8.73, the predecessor instruction to CALCRIM No. 522].) Thus, defendant claims his counsel's failure to request the instruction constitutes ineffective assistance.[3]

The standard of review for an ineffective assistance of counsel claim is well settled. A defendant must establish that counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694-695 (*Strickland*); *People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

It is "particularly difficult" for a defendant to prevail on direct appeal on a claim his trial counsel provided ineffective assistance. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) In reviewing an ineffective assistance of counsel claim, "[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.]" (*People v. Maury*, *supra*, 30 Cal.4th at p. 389.) A defense counsel's decision as to which jury instructions to request is an

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[3] Defendant contends his counsel rendered ineffective assistance by failing "to request a provocation instruction pertaining to reduction of attempted first degree murder to attempted second degree murder." However, "[a]ttempted murder is not divided into different degrees." (*People v. Favor* (2012) 54 Cal.4th 868, 876.) "'[T]he provision in section 664, subdivision (a), imposing a greater punishment for an attempt to commit a murder that is "willful, deliberate, and premeditated" does not create a greater degree of attempted murder but, rather, constitutes a penalty provision that prescribes an increase in punishment (a greater base term) for the offense of attempted murder.'" (*Id.* at p. 877.) We construe defendant's contention to be that his right to the effective assistance of counsel was violated because his counsel failed to request an instruction on provocation in relation to the deliberation and premeditation sentence enhancement for attempted murder.

inherently tactical decision. (*People v. Dennis* (1998) 17 Cal.4th 468, 527.) "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*Maury*, at p. 389.) Defendant has not satisfied his burden of establishing *Strickland*'s two requirements.

We find no deficient performance. Defense counsel was not asked to explain why he did not request CALCRIM No. 522. Counsel may have made a tactical decision that omitting the instruction was in his client's best interest. In his closing, counsel argued the jury should convict defendant of the lesser charges of assault with a deadly weapon or attempted voluntary manslaughter. Counsel may have been concerned CALCRIM No. 522 would cause the jury to focus on the charge of attempted murder rather than the lesser charges. Or counsel may have felt the instructions given were adequate to address the application of provocation on the premeditation and deliberation enhancement, as do we.

The jury was provided several instructions pertaining to defendant's mental state, which conveyed the same principles covered by CALCRIM No. 522. The jury was instructed that before the defendant could be found guilty of attempted murder, the People must prove defendant "intended to kill" the victim. (CALCRIM No. 600.) The jury was also instructed that if they found defendant guilty of attempted murder, then they must make a specific finding on whether the offense was willful, deliberate, and premeditated. (CALCRIM No. 601.) CALCRIM No. 601 informed the jury "[a] decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated." The court also instructed with CALCRIM No. 603, an instruction pertaining to attempted voluntary manslaughter

caused by heat of passion. This instruction informed the jury that "provocation" occurs when "a person of average disposition . . . act[s] rashly and without due deliberation, that is, from passion rather than from judgment." CALCRIM No. 603 further told the jury an attempted murder is reduced to attempted voluntary manslaughter if, among other things, "[t]he attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or judgment." The jury was also instructed the People had the burden of proving beyond a reasonable doubt that defendant attempted to kill someone and was not acting in the heat of passion when he did so. These instructions required the jury consider defendant's mental state and whether his decision to attempt to kill F.Z. was made rashly and without due deliberation. After considering defendant's mental state, the jury found he acted willfully, deliberately and with premeditation. Nothing in CALCRIM No. 522 would have further aided the jury in that endeavor.

Relying on *People v. Valentine* (1946) 28 Cal.2d 121 (*Valentine*) and *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, defendant contends his counsel should have requested the jury be instructed with CALCRIM No. 522 or its predecessor CALJIC No. 8.73 to explain that a subjective test is used in determining "whether provocation precluded the defendant from deliberating and forming premeditation."[4] Our Supreme Court rejected a similar argument concerning CALJIC No. 8.73 in *Rogers*, *supra*, 39 Cal.4th 826. We see no reason to depart from the analysis in *Rogers*.

[4] CALJIC No. 8.73 states: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation."

In *Rogers*, the defendant argued the trial court erred by failing to instruct sua sponte with CALJIC No. 8.73 to explain "provocation inadequate to reduce a killing from murder to manslaughter nonetheless may suffice to negate premeditation and deliberation," and thereby reduce the crime to second degree murder. (*Rogers, supra*, 39 Cal.4th at pp. 877-878.) The Supreme Court held the trial court had no duty to give the instruction on its own motion. (*Id.* at p. 880.) The *Rogers* court explained CALJIC No. 8.73 was based on its decision in *Valentine, supra*, 28 Cal.2d 121. In *Valentine*, where there were instructional errors concerning the degree of the murder and the burden of proof, the Supreme Court "suggested the instructions on heat-of-passion voluntary manslaughter were misleading because the jury might have understood them as implying that provocation that was inadequate to reduce the murder to manslaughter was irrelevant to any issue." (*Rogers,* at pp. 879-880, discussing *Valentine,* at pp. 130-134.) However, in *Rogers*, the court clarified "[i]n the absence of instructional errors such as were present in *Valentine*," the court is not required to instruct with CALJIC No. 8.73 for second degree murder. (*Rogers*, at p. 880.) "*Valentine* does not stand for the general proposition that the standard heat-of-passion voluntary manslaughter instructions are always misleading in a homicide case where the jury is instructed on premeditated murder and there is evidence of provocation, or that such manslaughter instructions always must be accompanied by instructions on the principle of inadequate provocation set out in CALJIC No. 8.73." (*Ibid*.) The *Rogers* court explained, "[T]he standard manslaughter instruction is not misleading, because the jury is told that premeditation and deliberation is the factor distinguishing first and second degree murder. Further, the manslaughter instruction does not preclude the defense from arguing that provocation played a role in preventing the defendant from premeditating and deliberating; nor does it preclude the jury from giving weight to any evidence of provocation in determining whether premeditation existed." (*Ibid*.)

Here, the court did not make the instructional errors present in *Valentine* and referenced in *Rogers*. (*Rogers, supra*, 39 Cal.4th at p. 880.) The jury was properly instructed on the specific intent requirement for attempted murder, the premeditation and deliberation allegation, attempted voluntary manslaughter based on provocation, and the People's burden of proof. The jury could understand from these instructions that a decision made rashly, impulsively, or without careful consideration was not deliberate and premeditated. The instructions informed the jury that provocation may cause a defendant to act rashly and without deliberation, meaning without premeditation. The instructions as a whole provided the jury with sufficient guidance regarding how the evidence of provocation potentially related to the elements of the attempted murder charge and the premeditation and deliberation enhancement.

As in *Rogers, supra*, 39 Cal.4th 826, the instructions did not prevent "the defense from arguing that provocation played a role in preventing the defendant from premeditating and deliberating." (*Id.* at p. 880.) In his closing argument, defense counsel used the instructions to argue the People had not proved either the attempted murder charge or the premeditation and deliberation allegation. Defense counsel argued the jury must find defendant not guilty of attempted murder because the People had failed to prove beyond a reasonable doubt that defendant intended to kill F.Z. or that he was not acting as a result of a sudden quarrel or in the heat of passion. Counsel discussed the attempted voluntary manslaughter instruction, CALCRIM No. 603, and argued the evidence established defendant was provoked and stabbed F.Z. in a heat of passion. Using CALCRIM No. 601, he explained to the jury "a decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequence[s] is not deliberate and premeditated." Defense counsel argued the evidence showed defendant acted impulsively and rashly when he stabbed F.Z. and the People therefore had not proved the premeditation and deliberation allegation.

Given the evidence, argument, and jury instructions in this case, the jury was fully informed it should consider defendant's mental and emotional state in deciding the premeditation and deliberation allegation. We find defense counsel's failure to request CALCRIM No. 522 or CALJIC No. 8.73 does not constitute deficient performance.

We find defendant has also failed to establish prejudice. The instructions on attempted murder and deliberation and premeditation required the jury consider defendant's subjective state. Defense counsel extensively argued in his closing argument that provocation played a role in preventing defendant from premeditating and deliberating. The evidence established defendant arrived at F.Z.'s apartment carrying a knife in his jacket. Evidence a defendant arrives at a victim's home carrying a weapon suggests reflection and a plan to kill. (*People v. Potts* (2019) 6 Cal.5th 1012, 1027.) When defendant's knife broke, he pulled F.Z. into the kitchen, obtained a larger knife, and stabbed her multiple times, even though she was already injured and bleeding. There was miniscule evidence defendant's decision to kill F.Z. was impulsive and the result of a sudden quarrel or heat of passion. The evidence instead established defendant premeditated and deliberated killing or attempting to kill her as he brought the knife with him and had previously threatened to kill her with a knife. It is not reasonably probable the verdict would have been more favorable to defendant if counsel had requested the jury be instructed with CALCRIM No. 522 or CALJIC No. 8.73.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.